

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA**

MINUTE ORDER

DATE: 10/16/2020

TIME: 08:20:00 AM

DEPT: 20

JUDICIAL OFFICER PRESIDING: Matthew P. Guasco

CLERK: Miriam Hernandez

REPORTER/ERM: Tanya Rogers

CASE NO: **56-2018-00513957-CU-MM-VTA**

CASE TITLE: **Brazier vs. Frey MD**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Medical Malpractice

EVENT TYPE: Demurrer (CLM) to First Amended Complaint by Def Pacific Pain Mgmt Inc and Robert Frey, M.D.

MOVING PARTY: Pacific Pain Management Inc, Robert Douglas Frey MD

CAUSAL DOCUMENT/DATE FILED: Demurrer to First Amended Complaint, Memorandum of Points and Authorities, Declaration of Laura Cota Esq in Support thereof, 02/18/2020

EVENT TYPE: Motion - Other (CLM) for order disqualifying

MOVING PARTY: Nicole Brazier

CAUSAL DOCUMENT/DATE FILED: Motion - Other for Order Disqualifying the Law Firm of Schaeffer Cota Rosen LLP and Attorney Kimberly Offenbacher from Representing Defendants in this Action; Memorandum of Points and Authorities; Declaration of David M. Karen, 03/03/2020

EVENT TYPE: Trial Setting Conference

APPEARANCES

DAVID M. KAREN, counsel, present for Plaintiff(s) telephonically.

James C. Schaeffer, counsel, present for Defendant(s) telephonically.

At 09:22 a.m., court convenes in this matter with all parties present as previously indicated.

The Court notes that a stipulation and order re: court reporter pro tempore will need to be signed by the parties and submit to the judicial assistant by the court reporter via e-mail.

Counsel have received and read the court's written tentative ruling.

Matter submitted to the Court with argument.

The Court finds/orders:

Defendants' Demurrer to the First Amended Complaint

The Court's tentative is adopted as the Court's ruling, as modified with the Court's corrections.

Meet & Confer

The Court is satisfied that defendants fulfilled their obligation to meet and confer with plaintiffs prior to filing the demurrer. (Code of Civ. Proc., §430.41, subd. (a).)

Legal Principles

In ruling on a demurrer, the Court treats all properly pleaded facts in the complaint as admitted. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318, 216 Cal.Rptr. 718, 703 P.2d 58.) The demurrer is limited to the four corners of the complaint and any additional facts which are properly the subject of judicial notice. (Code of Civ. Proc., § 430.30, subd.(a).) If there is a reasonable possibility that a pleading deficiency can be cured, it is an abuse of discretion for the Court to deny leave to amend. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318, 216 Cal.Rptr. 718, 703 P.2d 58.)

Demurrers on the ground of uncertainty are disfavored and should only be sustained in the event the complaint is so vaguely and deficiently pleaded that the demurring defendant reasonably cannot intelligently respond to the complaint. (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616, 17 Cal.Rptr.2d 708.)

Complaints must allege facts, not merely conclusions, supporting each cause of action. (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1509, 85 Cal.Rptr.3d 268.)

Ruling on Demurrer

(1) The Court OVERRULES the demurrer to the Third, Fourth and Fifth Causes of Action on the ground of uncertainty. There is nothing uncertain, or vague or ambiguous about these causes of action. Any further clarification may be achieved by discovery.

(2) The Court OVERRULES the general demurrer to the Third Cause of Action for battery. The FAC alleges sufficient facts to state a claim for medical battery arising from a cervical rhizotomy which allegedly involved the spinal cord as to which plaintiff did not consent. (See Judicial Council of California, *Civil Jury Instructions* ("CACI"), No. 530A.) While the issue of accidental injury to the spine arising from the shoulder rhizotomy also involves the issue of informed consent, that circumstance does not preclude plaintiff from alleging a medical battery cause of action. The two are not mutually exclusive.

(3) The Court SUSTAINS the general demurrer to the Fourth Cause of Action for general negligence WITHOUT LEAVE TO AMEND. The FAC alleges a cause of action for medical negligence. A liberal reading of the FAC leads to the inescapable conclusion that plaintiff's claims are all based upon the care and treatment she received from defendants who are health care professionals. There is no act of negligence alleged which is not related directly to that care and treatment. Accordingly, plaintiff cannot assert a legally viable cause of action for general negligence against defendants under any theory. (See *Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, 201 Cal.Rptr.3d 449, 369 P.3d 229.) This defect cannot be cured by amendment.

(4) The Court SUSTAINS the general demurrer to the Fifth Cause of Action for fraudulent concealment WITH LEAVE TO AMEND. The allegations in the FAC fall far short of the specificity required to state a cause of action for fraud as opposed to a failure to obtain plaintiff's informed consent to the rhizotomy procedure. (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 72-73, 269 Cal.Rptr. 337.) This defect theoretically can be cured by amendment, so the Court permits plaintiff leave to amend accordingly.

The Court ORDERS plaintiff to serve and file a Second-Amended Complaint consistent with the above and in conformity with the Code of Civil Procedure and the California Rules of Court by no later than **November 11, 2020**.

Counsel for defendants shall serve and file a notice of ruling and proposed order consistent with the above and in conformity with the Code of Civil Procedure and the Rules of Court.

Plaintiff's Motion for Order Disqualifying

The Court's tentative is adopted as the Court's ruling.

Request for Judicial Notice

The Court GRANTS plaintiff's request for judicial notice of documentation from the State Bar website, as well as records of this Court. (Evid. Code, § 452, subds. (c), (d).)

Ruling on Motion

For the following reasons, the Court GRANTS the motion to disqualify Offenbacher, but DENIES the motion to disqualify the SCR firm as counsel of record for defendants:

(1) Rule 3-310 of the Rules of Professional Conduct prohibits a lawyer from representing a client whose interests are adverse to those of a former client. In the classic "successive adverse representation" situation, the trial court has the broad discretion to disqualify the attorney in the interests of protection of the attorney/client relationship and confidential communications attendant thereto, as well as preservation of the fairness and integrity of the judicial process. (*H. F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1451, 280 Cal.Rptr. 614.)

(2) Here, it is undisputed that Offenbacher was employed by plaintiff's counsel of record, DK Law Group, at the time the Complaint was filed. Offenbacher participated in the preparation of the Complaint, although she has no independent recollection of this case or that work. Shortly after that work on this case, Offenbacher left DK Law Group and worked for several months with the Manning Kass firm in Los Angeles. She joined the SCR firm as an associate on December 17, 2018.

(3) It is undisputed that Offenbacher had no involvement in SCR's handling of the defense in this action from the time she became employed by SCR to the present. Plaintiff's counsel notified SCR on February 26, 2019, that a potential conflict of interest exists with regard to SCR's employment of Offenbacher. Upon learning of this concern, SCR took immediate steps to establish a separation or "firewall" shielding Offenbacher from any information or involvement in this action. These measures include limiting the work performed by SCR for defendants to two partners and a designated legal assistant, instituting password protected access to information and records concerning the case, locking Offenbacher out of such password access, and establishing a firm directive that Offenbacher shall not have any involvement in or receive any information concerning the action.

(4) The Court finds that plaintiff has established a "substantial relationship" between Offenbacher's work on behalf of plaintiff at DK Law Group, and the work of SCR in this action: the prior representation was of the plaintiff in this case in which Offenbacher's employer represents the defendants. This creates a conclusive presumption that Offenbacher received confidential information from her former client, plaintiff, whether Offenbacher remembers doing so or not. (*H. F. Ahmanson & Co. v. Salomon Brothers, Inc.*, *supra*, 229 Cal.App.3d at p.1451, 280 Cal.Rptr. 614.)

(5) The Court finds, therefore, that Offenbacher must be disqualified from having any involvement in the

defense of this action or divulging to SCR any information she may have gained about this case while working for DK Law Group. Accordingly, the Court GRANTS the motion to disqualify Offenbacher from representing or having any role in the defense of defendants in this action. Additionally, the Court ORDERS that the "firewall" procedures SCR has put in place to shield the firm from information Offenbacher may have learned while working on this matter at DK Law Group, and to shield Offenbacher from any information or involvement in this case, shall remain in effect for the course of SCR's involvement as counsel of record for defendants.

(6) The Court finds that plaintiff, through her counsel of record, DK Law Group effectively and expressly waived any conflict of interest concerning SCR remaining as counsel of record. This waiver is memorialized in an email from Mr. Karen to Mr. Schaeffer, dated March 20, 2019, which reads in pertinent part as follows: "In light of the understanding that you have effectively 'fire-walled' Kim [Offenbacher] from any access or involvement in this matter, upon confirmation that no file-related information has been shared or discussed with Kim, our client is amenable to waving [sic] the conflict provided those protections remain in place through the conclusion of the litigation." (Ex. A, Decl. of J. Schaeffer.)

(7) Further, the timing of this motion after plaintiff received the above-described assurance of the establishment of the "fire-wall" strongly, and made the waiver in reliance thereon, suggests this motion is made for tactical, not objectively fair or just, considerations. For example, Mr. Schaeffer declares, and Mr. Karen does not declare to the contrary, that Mr. Karen indicated plaintiff's interest in participating in an early mediation after advising Mr. Schaeffer that the "fire-wall" protocol would be acceptable to plaintiff. This strongly suggests the filing of the motion to disqualify after the waiver and when no mediation occurred is a form of tactical leverage without regard to the substantive or objective justness or fairness of the motion itself. If there is a conflict of interest substantial enough to warrant the bringing of this motion, it would not have vanished with the advent of a mediation; the same conflict would have prevented SCR's representation of defendants in a mediation, according to plaintiff's arguments in the motion. Moreover, the motion occurs many months after filing of the Complaint and following extensive litigation by the parties. The totality of the circumstances suggest a tactical, and not an objectively fair or just, motivation for bringing the motion at this late date. (*River West, Inc. v. Nickel* (1987) 188 Cal.App.3d 1297, 1310-11, 234 Cal.Rptr. 33.)

(8) The Court, therefore, DENIES the motion to disqualify the SCR law firm from being counsel of record for defendants herein. The Court is satisfied that the "fire-wall" procedure implemented by SCR, which the Court has made its Order going forward, provides the prophylactic assurances demanded by the Rules of Professional Conduct, the governing published appellate authorities, and the interests of justice here. (See *Kirk v. First American Title Ins. Co.* (2002) 183 Cal.App.4th 776, 108 Cal.Rptr.3d 620.)

Counsel for plaintiff shall serve and file a notice of ruling and proposed order consistent with the above and in conformity with the Code of Civil Procedure and the California Rules of Court.

Trial Setting Conference

Trial Setting Conference is continued to 01/13/2021 at 08:30 AM in department 20 by agreement of the parties. Telephonic appearance is required until further notice by the court.

A Joint Trial Setting Conference is to be filed 7 days prior to the hearing. Parties are advised of the Court's revisions to Courtroom 20's procedure on trial setting conferences, which may be found on the court's website under *Trial Setting Conferences in Courtroom 20*.

Parties waive notice.